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INTRODUCTION

National Nurses United (NNU) files this brief as *amicus curiae* in response to the Board's Notice and Invitation to File Briefs in this case. NNU represents over 150,000 Registered Nurses throughout the country, and, as such, is an interested party concerning the issues raised in this case.

NNU urges the Board to adhere to its precedent in *Purple Communications, Inc.*, 361 NLRB 1050 (2014) ("*Purple Communications*"), which recognized the enormous importance of email as a method of workplace communication in the U.S. today. The Board's well-reasoned decision in *Purple Communications* fulfills its "responsibility to adapt the Act to changing patterns of industrial life."¹ NNU urges the Board not to return to the legally- and practically-flawed standard for evaluating the use of an employer's email system set forth in *The Guard Publishing Company d/b/a The Register-Guard*, 351 NLRB 1110 (2007) ("*Register Guard*"), enfd. in part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

To the extent the Board should decide to modify *Purple Communications*, it should do so only in a manner that enhances employees' ability to communicate about Section 7 matters through the use of other employer electronic communications systems, such as texting, intranet postings, and instant messaging, where employees increasingly utilize such employer provided equipment in performing their work, applying the same standard as set forth in *Purple Communications*.

The Board should also ensure that the Section 7 right at issue is not swallowed by the "special circumstances," which it held in *Purple Communications* may justify restrictions on employee use of an employer's email system necessary to maintain production and discipline,

¹ *NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975).

and require the same sort of proof, as opposed to mere conjecture, where employer restrictions on employees' Section 7 rights may be held lawful.

STATEMENT OF THE CASE

Respondent, Caesar's Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino, filed exceptions to the May 3, 2016, Administrative Law Judge's Decision ("ALJD"), finding that Respondent violated Section 8(a)(1) of the Act by "maintaining an overly broad computer usage policy that effectively prohibits employees' use of Respondent's email system to engage in Section 7 communications during nonworking time." ALJD at 9.² An initial Administrative Law Judge's Decision issued in this case on March 20, 2012. During the pendency of the case, the Board issued its decision in *Purple Communications*, and subsequently severed and remanded Respondent's "Use of Company Systems, Equipment, and Resources" rules for further proceedings before the assigned administrative law judge, "consistent with *Purple Communications*, including allowing the parties to introduce evidence relevant to a determination of the lawfulness of those rules." 362 NLRB No. 190, slip op. at 5, 7 (2015).

On remand, the ALJ determined that Respondent allows employees access to its email system.³ ALJD at 7. Respondent's rules at issue provide:

Do not disclose or distribute outside of [Rio's] any information that is marked or considered confidential or proprietary unless you have received a signed non-disclosure agreement through the Law Department. In some cases, such as with Trade Secrets, distribution within the Company should be limited and controlled (e.g., numbered copies and a record of who has received the information). You are responsible for contacting your department manager or the Law Department for instructions.

Computer resources may not be used to:

- Commit, aid or abet in the commission of a crime

² Herein, "ALJD" will refer to the May 3, 2016, Administrative Law Judge's Decision.

³ *Purple Communications* does not "require an employer to grant employees access to its email system, where it has not chosen to do so." *Purple Communications, Inc.*, 361 NLRB at 1064.

- Violate local, state or federal laws
- Violate copyright and trade secret laws
- *Share confidential information with the general public, including discussing the company, its financial results or prospects, or the performance or value of company stock by using an internet message board to post any message, in whole or in part, or by engaging in an internet or online chatroom*
- *Convey or display anything fraudulent, pornographic, abusive, profane, offensive, libelous or slanderous*
- *Send chain letters or other forms of non-business information*
- Seek employment opportunities outside of the Company
- Invade the privacy of or harass other people
- *Solicit for personal gain or advancement of personal views*
- *Violate rules or policies of the Company*

Do not visit inappropriate (non-business) websites, including but not limited to online auctions, day trading, retail/wholesale, chat rooms, message boards and journals. Limit the use of personal email, including using streaming media (e.g., video and audio clips) and downloading photos.⁴

The ALJ found that Respondent's Computer Resources Rule's prohibition on emailing non-business information was presumptively unlawful and concluded that Respondent did not demonstrate special circumstances to justify the rule. ALJD at 8. Accordingly, Respondent was held to have violated Section 8(a)(1) of the Act. ALJD at 9.

ARGUMENT

1. **The Board Should Adhere to its Decision in *Purple Communications*.**

The Board emphasized in *Purple Communications* that “[e]mail remains the most pervasive form of communication in the business world[,]” and that work-related email traffic

⁴ Italicized for emphasis in original, 362 NLRB No. 190, slip op. at fn. 13 and ALJD at 2-3.

will continue to increase.”⁵ *Purple Communications, Inc.*, 361 NLRB at 1055-56. As the *Purple Communications* Board explained, email has become a “natural gathering place” for employees to communicate with each other, similar to the hospital cafeteria, as recognized by the Supreme Court in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). *Purple Communications, Inc.*, 361 NLRB at 1057. In light of these realities, the Board adopted a new analytic framework with regard to employees’ use of employer email systems for Section 7 purposes. That framework presumes “that employees who have rightful access to their employer’s email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time[,]” absent special circumstances necessary to maintain production or discipline to justify a particular restriction on email use. *Id.* at 1063.

As emphasized by Member McFerran in dissenting to the Board majority’s decision to consider overruling *Purple Communications*, “Respondent has not presented any empirical evidence, or even good reason to suspect, that *Purple Communications* has proved problematic in practice, as predicted by critics of its holding[,]” nor has it “identified any adverse judicial decisions that might warrant revisiting the decision.” *Caesars Entertainment Corporation d/b/a Rio All Suites-Hotel and Casino*, 28-CA-060841, Notice and Invitation to File Briefs dated August 1, 2018, at 5. To the contrary, as will be set forth below, returning to the *Register Guard* standard would, ironically in the words of then-Member Miscamarra dissenting in *Purple Communications*, “create significant problems and intractable challenges for employees, unions, employers, and the NLRB.” *Purple Communications, Inc.*, 361 NLRB at 1086 (dissenting opinion).

⁵ Citing *Email Statistics Report, 2014-2018, Executive Summary*, The Radicati Group, Inc., at 2, available at <https://www.radicati.com/wp/wp-content/uploads/2014/01/Email-Statistics-Report-2014-2018-Executive-Summary.pdf>. These trends only continue to increase. See *Email Statistics Report, 2016-2020*, The Radicati Group, Inc., available at https://www.radicati.com/wp/wp-content/uploads/2016/01/Email_Statistics_Report_2016-2020_Executive_Summary.pdf.

As the *Purple Communications* Board held, *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) provides the proper analytical framework for addressing employees’ use of their employer’s email system for Section 7 communications. *Purple Communications, Inc.*, 361 NLRB at 1060. The Court, in *Republic Aviation*, upheld the Board’s reasoning that in accommodating “the undisputed right of self-organization assured to employees under the Wagner Act[,]” 324 U.S. at 798, that “[i]nconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining.” *Id.* at 802 fn. 8. As the *Purple Communications* Board noted, “[w]hether and when that [property] right ‘must give way to competing Section 7 rights’⁶ is precisely what we analyze, consistent with *Republic Aviation* and numerous subsequent cases.” *Purple Communications, Inc.*, 361 NLRB at 1060 fn. 50.⁷

The Act bestows employees with affirmative Section 7 rights to engage in concerted activity for mutual aid and protection. 29 U.S.C. § 157. Employees’ exercise of such rights “‘necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite[,]’”⁸ and “‘the place of work is a place uniquely appropriate for dissemination of views’ about such matters.”⁹ In light of the changed reality of the modern workplace, where email communication has become a natural gathering place for employees to communicate with each other, the *Purple Communications* Board was absolutely correct to recognize that employees, who are rightfully on their employer’s property, and have already been provided access to their employer’s email system, enjoy a statutory right to utilize the

⁶ *Purple Communications, Inc.*, 361 NLRB at 1073 fn.43 (Miscimarra, dissenting).

⁷ As the Board persuasively explained in *Purple Communications*, the “equipment” cases relied on by the *Register Guard* majority for the broad proposition that employers may broadly prohibit employee use of such equipment involved modalities of workplace communication that are vastly different than email. *Purple Communications, Inc.*, 361 NLRB at 1057. “Employee email use will rarely interfere with others’ use of the email system or add significant incremental usage costs, particularly in light of the enormous increases in transmission speed and server capacity.” *Id.* at 1058.

⁸ *Purple Communications, Inc.*, 361 NLRB at 1054 (quoting *Beth Israel Hospital v. NLRB*, 437 U.S. at 491-492).

⁹ *Id.* at 1054 (quoting *NLRB v. Magnavox of Tennessee*, 415 U.S. 322, 325 (1974)).

employer-provided email system for Section 7 purposes.

Purple Communications was correctly decided in light of the doctrinal reasons above, and additional empirical analyses and anecdotal evidence demonstrate the importance of its holding on a practical basis. Workplace structures and communication pathways have shifted dramatically in the past decade, and continue to rapidly change as technologies evolve and work sites adapt. The hospital setting is no exception. The use of technology is changing the way caregivers communicate amongst themselves and with their respective supervisors, managers, and other employer agents. “In large part because of the change in hospital landscapes and communication technologies, workplace contact in hospitals occurs more and more frequently via e-mail and other internal electronic messaging systems run by the hospital,” Malinda Markowitz, RN, CNA/NNOC Co-President. Two notable shifts in physical hospital layouts have encouraged, and made necessary, electronic communication among employees, both with each other and with their employer: the rise of decentralized nursing stations and the shift away from single-building hospitals to multi-building medical centers and complexes.

Nursing stations have traditionally provided a centralized space for work collaboration and socialization among caregivers in the hospital setting. However, in efforts to reconfigure hospital workflow, many hospitals have shifted away from centralized nursing stations, where nurses and caregivers from multiple different departments formerly came together, to smaller, more isolated decentralized substations spread throughout the hospital.¹⁰ Increasingly, nursing unit designs are incorporating decentralized nurses’ stations immediately outside patient rooms so that staff members are dispersed around the unit closer to the point of care. This design makes in-person interactions between nurses, other healthcare providers, and employer agents less frequent. To maintain necessary communication amongst hospital employees despite this more

¹⁰ See, e.g., *Design Dilemma: Nurses’ Stations*, Chiang, DEA 4530 (2010). <https://cpb-us-e1.wpmucdn.com/blogs.cornell.edu/dist/a/3723/files/2013/09/Nurses-stations-qr3u4x.pdf>

separated setup, most, if not all, hospital employers have established employer-run email and/or other electronic communication systems, accessible from any internet-capable device or station, including nurses' stations. "The use of hospital-run email communication is prevalent in nearly all hospitals today, and nurses and other hospital employees use email daily to communicate with each other and our employers about work related issues and for social interactions as well," Cokie Giles, CNA/NNOC Co-President. "Because nurses are now spread throughout the hospital and more segregated by department and specialization, it is impractical and inefficient to leave our work areas to try to have in-person conversations every time we need to communicate with one another," Cathy Kennedy, RN, CNA/NNOC Secretary. Surely, hospital employers have utilized email communication systems precisely because of the increased efficiencies and recognized need for alternate communication systems, as work environments in the healthcare setting have changed to make regular in-person communication amongst employees impracticable.

Beyond shifting locations of nurses' stations, hospital buildings themselves have and continue to change in structural layout, further necessitating electronic communication in the workplace. For example, the hub-and-spoke organization design of hospitals is a model which arranges service delivery assets into a network consisting of an anchor establishment (hub) with certain services, complemented by often numerous secondary establishments (spokes), which offer more limited service arrays and specialties.¹¹ In practical terms, the hub-and-spoke model yields a healthcare network consisting of a main campus and often multiple satellite campuses that all work together as an integrated workplace. Basic healthcare services are broadly distributed across the network of satellite campuses, with a bulk of healthcare services provided in isolated localities. As a result, employees housed in the separate satellite campuses, or

¹¹ See, e.g., *The hub-and-spoke organization design: an avenue for serving patients well*, Elrod, BMC Health Services Research (2017).

“spokes”, do not have regular physical interaction with employees in the other “spokes” or in the main “hub.” However, communication between all parts of healthcare delivery, “hub” and “spokes,” remains essential. These types of models, therefore, by design require a reliance on alternative means of communication, namely electronic communication systems. And employees, similarly, must rely on these same electronic communication networks in the exercise of their most basic Section 7 rights—to act and communicate collectively about shared workplace issues.

2. *Register Guard* Was Both Practically and Doctrinally Flawed.

As aptly described by then-Members Liebman and Walsh, the *Register Guard* “decision confirms that the NLRB has become the Rip Van Winkle of administrative agencies. . . Only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace.” *Register Guard*, 351 NLRB at 1121 (internal quotations omitted) (dissenting opinion). Although the Board woke up in *Purple Communications* to the fact that email has become a primary means of communication in the workplace, such that Section 7 rights must be accommodated, Respondent now asks the Board to go for a ride in Marty McFly’s DeLorean,¹² back to a time when email was a novelty, not the natural gathering place it has become for employees to communicate with one another, and overrule *Purple Communications*.

Should the Board return to its *Register Guard* framework it would not only shirk its “responsibility to adapt the Act to changing patterns of industrial life,”¹³ but would cause significant practical problems for both employees and employers, as the great multitude of employers who provide email access to their employees would necessarily have to maintain and enforce rules that prohibit non-work use of their email systems to lawfully ban communications

¹² *Back to the Future* (Amblin Entertainment 1985).

¹³ *NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975).

protected by Section 7. As the *Purple Communications* Board explained, 361 NLRB at 1056, “[s]ome personal use of email systems is common and, most often, is accepted by employers,” quoting, inter alia, a 2010 Supreme Court decision, which acknowledged that “[m]any employers expect or at least tolerate personal use of [electronic communications] equipment by employees because it often increases worker efficiency.” *Purple Communications, Inc.*, 361 NLRB at 1056 (quoting *City of Ontario, California v. Quon*, 560 U.S., 759 (2010)). The Supreme Court of Wisconsin, the *Purple Communications* Board also noted, found that email “is often the fastest and least disruptive way to do a brief personal communication during the work day.” *Purple Communications, Inc.*, 361 NLRB at 1056 (quoting *Schill v. Wisconsin Rapids School District*, 786 N.W.2d 177, 182-183 (Wisc. 2010)).

That employers would be required to ban all non-work related email under the *Register Guard* framework, even on employees’ non- work time, is demonstrated by the flawed analysis of the Section 8(a)(1) complaint allegations articulated by the *Register Guard* Board majority. In this regard, the *Register Guard* Board relied on erroneous reasoning in two Seventh Circuit cases, *Fleming Co. v. NLRB*, 349 F.3d 968 (7th Cir. 2003), denying enf. to 336 NLRB 192 (2001), and *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995), denying enf. to 313 NLRB 1275 (1994). Both cases denied enforcement of Board Orders concerning rules that the Board found discriminatorily restricted use of employer bulletin boards for Section 7-protected communications under longstanding precedent. As the dissenting opinion of then-Members Liebman and Walsh in *Register Guard* vigorously set forth, the Seventh Circuit analysis, adopted by the *Register Guard* majority, is seriously flawed with regard to the meaning of discrimination in Section 8(a)(1) cases. *Register Guard*, 351 NLRB at 1127 (dissenting opinion).

Nevertheless, the *Register Guard* Board majority overturned longstanding Board

precedent¹⁴ and held that “unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status.” *Id.* at 1119. Under this analysis, “[A]n employer may draw a line between charitable solicitation and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use. In each of these examples, the fact that the union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines.” *Id.* at 1118.

Applying this new standard, the Board held that the employer did not violate the Act by prohibiting union-related solicitations or disciplining an employee who had engaged in this activity. However, the Board found that the employer did violate the Act by disciplining an employee for another union-related e-mail communication because that communication did not constitute a solicitation and the employer’s policy only prohibited “nonjob-related solicitations” not all “nonjob-related communications.” *Id.* at 1119.

The *Register Guard* dissent pointed out: “The Board’s existing precedent on discriminatory enforcement—that an employer violates Section 8(a)(1) by allowing nonwork-related uses of its equipment while prohibiting Section 7 uses—is merely one application of Section 8(a)(1)’s core principles: that employees have a right to engage in Section 7 activity, and

¹⁴ “In particular, and in accord with the decades old understanding of discrimination within the meaning of the National Labor Relations Act, the Board has long held that an employer violates [Section 8(a)(1)] by allowing employees to use an employer’s equipment or other resources for nonwork-related purposes while prohibiting Section 7-related uses.” *Register Guard*, 351 NLRB at 1127-1128 (dissenting opinion) (citing e.g., *Richmond Times-Dispatch*, 346 NLRB 74 (2005), *enfd.* 225 Fed. Appx. 144 (4th Cir. 2007), *cert. denied* 552 U.S. 990 (2007); *Von’s Grocery Co.*, 320 NLRB 53 (1995); *E.I. du Pont de Nemours & Co.*, 311 NLRB 893 (1993); *Honeywell, Inc.*, 262 NLRB 1402 (1982), *enfd.* 722 F.2d 405 (8th Cir. 1983); *Union Carbide*, 259 NLRB 974, 980 (1981).

that interference with that right is unlawful unless the employer shows a business justification that outweighs the infringement. Discrimination, when it is present, is relevant simply because it weakens or exposes as pretextual the employer's business justification." *Id.* at 1129.¹⁵

The Court of Appeals for the D.C. Circuit granted the union's petition for review of the Board's *Register Guard* decision and remanded the case to the Board for further proceedings. The court reasoned that the *Register Guard* Board's conclusion that the employer did not unlawfully discipline the employee because there was "no evidence that [Register-Guard] permitted employees to use e-mail to solicit other employees *to support any group or organization*" was a "post hoc invention" by the Board, [w]hatever the propriety of drawing a line barring access based on organizational status." *Guard Publishing v. NLRB*, 571 F.3d at 60.

On remand, the Board, accepting the court's opinion as the law of the case, emphasized the court's observation that neither the employer's policy, nor its explanation to the employee for the discipline, "drew a distinction between individual and organizational solicitations" and concluded that the employer violated the Act by disciplining the employee for the union solicitation emails. *The Guard Publishing Company d/b/a The Register-Guard*, 357 NLRB 187, 189 (2011).

The *Register Guard* majority's complicated post hoc construction of Section 8(a)(1) discrimination not only fails to follow longstanding Board precedent, as set forth above, but demonstrates the practical problems employees and employers alike will face should the doctrinally correct, clear, and practical standard of *Purple Communications* be overturned. Looking, for example, at the arcane post hoc distinction along organizational lines drawn by the *Register Guard* majority, how is the reasonable employee expected to understand the distinction

¹⁵ As the dissent stressed, "[u]nlike antidiscrimination statutes, the Act does not merely give employees the right to be free from discrimination based on union activity. It gives them the *affirmative* right to engage in concerted *group* action for mutual benefit and protection." *Register Guard*, 351 NLRB at 1129 (dissenting opinion).

between personal solicitations to other employees to offer sports tickets (which may involve a sports *organization* such as Major League Baseball)¹⁶ and solicitations to come to the events of a labor organization?

Moreover, in order to consistently enforce a policy prohibiting the solicitation of other employees to support any group or organization (the post hoc re-writing of the employer's policy by the *Register Guard* majority), employers will be forced to scrutinize all employee email regularly to discern whether employees are soliciting on behalf of a group or organization in order to ensure that they are not disparately enforcing such a policy if restricting Section 7-related solicitations. The same of course holds true for employer email policies banning all non-work related communications. Adhering to *Purple Communications* is not only doctrinally correct, as set forth above, but returning to the *Register Guard* analysis is impractical in its application for employees, employers, as well as the NLRB, itself.

3. Any Employer Restrictions on the Statutory Right to Engage in Section 7-Protected Communications via Employer Email Based on Special Circumstances Must Continue to Require Proof as Opposed to Speculation.

The *Purple Communications* Board concluded that the Board “will presume that employees who have rightful access to their employer’s email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time.” *Purple Communications, Inc.*, 361 NLRB at 1063. However, under *Purple Communications* “an employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees’ rights.” *Id.* The Board emphasized that “an employer contending that special circumstances justify a particular restriction must demonstrate the connection between the interest it asserts and the restriction. The mere assertion of an interest that could theoretically support a restriction will

¹⁶ See *Register Guard*, 351 NLRB at 1111.

not suffice.” *Id.* Such a standard is consistent with *Republic Aviation* and must be maintained with regard to Section 7-protected communications via employer provided email systems. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 at 804.

The Board’s decision in *UPMC*, 362 NLRB No. 191 (2015) provides an example of the doctrinally correct application of the “special circumstances” exception, while the dissenting opinion of then-Member Johnson demonstrates an erroneous application of the “special circumstances” exception that would threaten to swallow the statutory right at issue. The case in *UPMC* was pending before the Board when *Purple Communications* issued and addressed the employer’s solicitation policy, which prohibited use of the employer’s email system to engage in solicitation (including Section 7-protected communications) in the acute care hospital setting. See *UPMC*, 362 NLRB No. 191, slip op. at 2-3.

The employer asserted computers and electronic communication systems provided a source of distraction with regard to patient care, but failed to establish “a connection between the interest” asserted and the restriction on Section 7 rights. *UPMC*, 362 NLRB No. 191, slip op. at 4. With particular regard to studies relied upon by the employer, the Board stressed that “[n]othing in the studies cited by [the employer] demonstrates that patient-safety interests would not be similarly affected by employee email use” authorized by the employer, and emphasized that the employer did not explain why its concerns “would justify applying this prohibition to nonworking time.” *Id.* Accordingly, the Board found that the employer violated Section 8(a)(1) by the maintenance of the policy. *Id.*

Then-Member Johnson, dissenting in part, while adhering to his view that *Purple Communications* was wrongly decided, was of the view that the employer had established special circumstances “justifying its ban on use of its electronic resources for solicitation[.]” noting that he would not extend the presumption of a Section 7 right to the healthcare setting. *UPMC*, 362

NLRB No. 191, slip op. at 9 (dissenting opinion). In attempting to justify this position, then-Member Johnson speculated that employees will engage in distracting Section 7 related discussion on work time, merely because an email may have been received by an employee during working time, *id.* at 10, failing to acknowledge the *UPMC* majority’s observation that the employer was permitted “to fashion a policy that applies solely to working time. . . under *Purple Communications*.” *UPMC*, 362 NLRB No. 191, slip op. at 4.

Just as the Board has treated the restriction of other statutory rights based on “special circumstances,” the Board must continue to require that an employer demonstrate with evidence the connection between the interest asserted by the employer and the restriction of Section 7 rights. Cf. *Danbury HCC*, 360 NLRB 937, 938 and fn. 5 (2014) (“[A]n employer who presents only generalized speculation or subjective belief about potential disturbance. . . or disruption of operations fails to establish special circumstances justifying a ban on union insignia.”), *enfd. sub nom. HealthBridge Management, LLC v. NLRB*, 798 F.3d 1059 (D.C. Cir. 2015).

4. Extension to Other Employer Communications Systems, such as Instant Messaging.

As the *Purple Communications* Board emphasized, the Supreme Court “observed in *Republic Aviation* that the underlying Board decision ‘was the product of the Board’s appraisal of normal conditions about industrial establishments.’” *Purple Communications, Inc.*, 361 NLRB at 1061 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. at 804.) *Purple Communications* recognized that “normal conditions” evolve and change. *Purple Communications, Inc.*, 361 NLRB at 1061. The decision also stressed that “empirical evidence demonstrates that email has become such a significant conduit for employees’ communications with one another that it is effectively a new ‘natural gathering place’¹⁷ and a forum in which coworkers who ‘share common interests’ will ‘seek to persuade fellow workers in matters

¹⁷ *Beth Israel Hospital v. NLRB*, 437 U.S. at 505.

affecting their union organizational life and other matters related to their status as employees.”¹⁸
Purple Communications, Inc., 361 NLRB at 1061.

Just as email has become a natural gathering place for employee communication, instant messaging (IM) “continues to see strong growth with both business and consumer users on a worldwide basis.”¹⁹ A 2017 survey found that 43 percent of employees use instant messaging on the job.²⁰ As new technologies are made available to employees by their employers for workplace communication and they become gathering places for workplace communication, the Board must continue to adapt the Act to changing patterns of industrial life²¹ and recognize employees’ statutory right to such employer-provided technologies for Section 7 purposes.

CONCLUSION

The Board should adhere to its *Purple Communications* precedent, consistent with “the policy of the United States” of “protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.” 29 U.S.C. § 151.

DATED: October 5, 2018

Respectfully submitted,

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¹⁸ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (quoting *Gale Products*, 142 NLRB 1246, 1249 (1963)).

¹⁹ See *Instant Messaging Statistics Report, 2016-2020*, The Radicati Group, Inc., available at https://www.radicati.com/wp/wp-content/uploads/2018/01/Instant_Messaging_Statistics_Report_2018-2022_Executive_Summary.pdf.

²⁰ See *Can We Chat? Instant Messaging Apps Invade the Workplace*, ReportLinker Insight, available at <https://www.reportlinker.com/insight/instant-messaging-apps-invade-workplace.html>.

²¹ *NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975).

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, not a party to the within action and that my business address is 155 Grand Ave., Oakland, California 94612.

On the date below, I served the following document:

BRIEF OF *AMICUS CURIAE* CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED IN SUPPORT OF CHARGING PARTY

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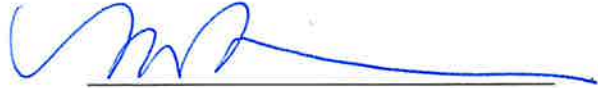
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 5, 2018, at Oakland, California.

A handwritten signature in blue ink, appearing to be 'Marie Walcek', written over a horizontal line.

Marie Walcek